In The

Supreme Court of the United States

October Term, 1975

No. 75-1312

DON E. WILLIAMS COMPANY,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

On Writ Of Certiorari To The United States Court
Of Appeals For The Seventh Circuit

BRIEF FOR DON E. WILLIAMS COMPANY

MARVIN L. SCHRAGER
DURWARD J. LONG, SR.
912 - 16th Avenue
East Moline, Illinois 61244
Attorneys for Appellant

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OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's Petition for Writ of Certiorari, Appendix B) is reported at 527 F.2d 649. The opinion of the Tax Court (Petitioner's Petition for Writ of Certiorari, Appendix A) is reported at 62 T.C. 166.

JURISDICTION

The judgment of the Court of Appeals (Joint App.) was entered on December 16, 1975. A petition for a writ of certiorari was filed on March 13, 1976, and was granted on June 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether the delivery by Don E. Williams Company, an accrual basis taxpayer, of a promissory note with a face value of $31,589.32 secured by an assignment by the President and Vice President of their interests in the Profit Sharing Trusts, an assignment by the President of his 4,180 shares of $10.00 par value common stock of the Don E. Williams Company and personally guaranted by the President, Vice President and Secretary-Treasurer of the Don E. Williams Company constituted the "payment" under 26 U.S.C. § 404 to the Profit Sharing Trust of Don E. Williams Company's $31,589.32 designated contribution to the Profit Sharing Trust for the year ended April 30, 1967.

II. Whether the delivery by Don E. Williams Company, an accrual basis taxpayer, of a promissory note with a face value of $34,333.26 secured by an assignment by the President and Vice President of their interests in the Profit Sharing Trusts, an assignment by the President of his 4,180 shares of $10.00 par value common stock of the Don E. Williams Company and personally guaranteed by the President, Vice President and Secretary-Treasurer of Don E. Williams Company constituted the "payment"

under 26 U.S.C. § 404 to the Profit Sharing Trust of Don E. Williams Company's $34,333.26 designated contribution to the Profit Sharing Trust for the year ended April 30, 1968.

III. Whether the delivery by Don E. Williams Company, an accrual basis taxpayer, of a promissory note with a face value of $35,337.86 secured by an assignment by the President and Vice President of their interests in the Profit Sharing Trusts, an assignment by the President of his 4,180 shares of $10.00 par value common stock of the Don E. Williams Company and personally guaranteed by the President, Vice President and Secretary-Treasurer of Don E. Williams Company constituted the payment under 26 U.S.C. § 404 to the Profit Sharing Trust of Don E. Williams Company's $35,337.86 designated contribution to the Profit Sharing Trust for the year ended April 30, 1969.

STATUTES INVOLVED

The Internal Revenue Code Of (1954), §§ 404(a)(3)(A) & (6), 26 U.S.C. § 404(a)

(3) Stock bonus and profit-sharing trusts:

(A) Limits on deductible contributions. In the taxable year when paid, if the contributions are paid into a stock bonus or profit-sharing trust, and if such taxable year ends within or with a taxable year of the trust with respect to which the trust is exempt under section 501(a), in an amount not in excess of 15 percent of the compensation otherwise paid or accrued during the taxable year to all employees under the stock bonus or profit-sharing plan. . . .

(6) Taxpayers on accrual basis:

For purposes of paragraphs (1), (2), and (3), a taxpayer on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

STATEMENT

This appeal arises out of a complaint brought by the Petitioner, Don E. Williams Company, (hereinafter "Dewco") against the Respondent, Commissioner of Internal Revenue (hereinafter "C.I.R."). In its complaint Petitioner asked for a redetermination of the deficiency set forth by the C.I.R. in his Notice of Deficiency dated May 25, 1971.

The deficiency, which Petitioner feels is in error, as determined by the C.I.R. is in income tax as follows and results from disallowance of tax deductions.

Fiscal Year Ending	*Amount of Disallowance*	*Amount/Tax Assessed*
April 30, 1967	$31,589.32	$15,162.87
April 30, 1968	$ 2,743.94	$ 1,360.64
April 30, 1969	$ 1,004.60	$ 530.42

The commissioner erroneously determined for fiscal year ending April 30, 1967, that the delivery of the Petitioner's secured, interest-bearing, negotiable and payable on demand promissory note in the amount of $31,589.32, and within the "grace period" allowed an accrual basis taxpayer by § 404 (a)(6) of the Internal Revenue Code of 1954 to the Don E. Williams Company Profit-Sharing Trust, did not constitute payment within the ambit of § 404 (a) of the Internal Revenue Code of 1954.

The commissioner erroneously determined for fiscal year ending April 30, 1968, that the delivery of the Petitioner's secured, interest-bearing, negotiable and payable on demand promissory note in the amount of $34,333.26, within the "grace period" allowed an accrual basis taxpayer by § 404 (a)(6) of the Internal Revenue Code of 1954 to the Don E. Williams Company Profit-Sharing Trust, did not constitute payment within the ambit of § 404 (a) of the Internal Revenue Code of 1954.

The commissioner erroneously determined for fiscal year ending April 30, 1969, that the delivery of the Petitioner's secured, interest-bearing, negotiable and payable on demand promissory note in the amount of $35,337.86, within the "grace period" allowed an accrual basis taxpayer by § 404 (a)(6) of the Internal Revenue Code of 1954 to the Don E. Williams Company Profit-Sharing Trust, did not constitute payment within the ambit of § 404 (a) of the Internal Revenue Code of 1954.

The facts and exhibits were stipulated to by the parties and the case was submitted to the Tax Court of the United States.

Judgment was entered for the Respondent, with three judges dissenting, assessing deficiencies in income tax due from Petitioner as set forth above.

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed, however, in doing so they declined to follow decisions of the Third, Ninth, and Tenth Circuits and also a district court decision in the Seventh Circuit.

ARGUMENT

I.

FOR AN ACCRUAL BASIS TAXPAYER THE GIVING OF A DEMAND PROMISSORY NOTE CONSTITUTES "PAYMENT" WITHIN THE MEANING OF SECTION 404(a)(6).

The Commissioner of Internal Revenue denied the Petitioner a deduction under Section 404(a), Int. Rev. Code of 1954 (26 U.S.C.) claiming that the taxpayer's contribution to its profit sharing plan was not "paid", as defined by Section 404(a), by the giving of a secured interest bearing demand promissory note and that consequently, "payment" was not made as defined in Section 404(a)(6).

Petitioner was on the accrual basis method of accounting. Notwithstanding that fact, the Commissioner contends that the sole use of the word "paid" in Section 404(a) as distinguished from the use of the terms "paid or incurred" and "paid or accrued" in other deduction sections of the Code automatically converts an accrual basis taxpayer to the cash basis method of accounting for the purposes of Section 404(a). This is a position which had been unanimously rejected by courts of appeals for the Third, Ninth and Tenth Circuits. *Sachs* v. *Commissioner,* 208 F.2d 313 (C.A. 3, 1953); *Time Oil Co.* v. *Commissioner,* 258 F.2d 237 (C.A. 9, 1958); *Wasatch Chemical Co.* v. *Commissioner,* 313 F.2d 843 (C.A. 10, 1963). These decisions are consistent with the principles of accrual accounting.

Section 404(a) is not the only section of the Code where the word "paid" is used in such a manner. Section 267(a)(2)(A), Int. Rev. Code of 1954 (26 U.S.C.), which also dealt

with deductions for employee compensation, in pertinent part reads:

> . . . Losses, expenses, and interest with respect to transactions between related taxpayers. . . .
> (2) *Unpaid expenses and interest.* . . . In respect of expenses, otherwise deductible under section 162 or 212, or of interest, otherwise deductible under section 163,—
>
> (A) If within the period consisting of the taxable year of the taxpayer and 2½ months after the close thereof (i) such expenses or interest are *not paid*. . . . (Emphasis added)

The forerunner of Section 267(a)(2)(A) was Section 24(c)(1), Int. Rev. Code of 1939, which was substantially the same and also contained the word "paid".

In the case of *Anthony P. Miller, Inc.* v. *Commissioner,* 164 F.2d 268 (C.A. 3, 1947) the taxpayer accrued salary to its president and, the day after the close of the taxable year, delivered negotiable demand notes in discharge of the liability. These notes were, in fact, redeemed two years later. The Commissioner of Internal Revenue had denied the corporation a deduction for the salary on the ground that it was not paid within two and one-half months after the close of the taxable year, as was required under Section 24(c)(1). The court held that by the giving of the notes, the taxpayer paid its president's salary within the meaning of Section 24(c)(1). In addition to *Miller, Supra,* there is ample authority to the effect that delivery of a promissory note by an accrual basis taxpayer constituted "payment" under Section 24(c)(1). *Musselman Hub-Brake Co.* v. *Commissioner,* 139 F.2d 65 (C.A. 6, 1943); *Celina Manufacturing Company* v. *Commissioner,* 142 F.2d 449 (C.A. 6, 1944); *Mundet Cork Corporation* v. *Commissioner,*

173 F.2d 757 (C.A. 2, 1949); and *Akron Welding and Spring Co.*, 1948, 10 T.C. 715.

The court of appeals below in its opinion does not dispute the correctness of the *Miller* line of cases and makes no effort to distinguish them from this case. A holding adverse to the taxpayer here could cast serious doubts as to the validity of the *Miller, Supra*, case and all the other cases which hold that the "paid" requirements of Section 24(c) (1) are fulfilled by an accrual basis taxpayer's giving of a promissory note. The Tax Court below attempts to distinguish the *Miller* decision on the ground that it deals with a different statute and that Section 404(a) precludes deductions for contributions under Sections 162 and 212 of the Int. Rev. Code of 1954. (Pet. for Cert., App. A p. 6a) However, the courts have held that when the same word is used in two places in the Code, it is ordinarily to be given the same meaning in both places. *Meyer* v. *United States*, 175 F.2d 45, 47 (C.A. 2, 1949); *Lewellyn* v. *Harbison*, 31 F.2d 740 (C.A. 3, 1929); *Commissioner* v. *Estate of Ellis Branson Ridgeway*, 291 F.2d 257, 259 (C.A. 3, 1961). The Tax Court's reasoning also ignores the fact that the nature of the deductions is basically the same, namely, employee compensation.

It should be noted that in the instant case the trustees of the profit-sharing plan were required to report the notes they received as income on their annual information reports to the Internal Revenue Service. Section 6047, Int. Rev. Code of 1954 (26 U.S.C.). Except for the exempt status granted the trust by Section 501(c), Int. Rev. Code of 1954, the receipt of the taxpayer's notes would have constituted taxable income. Accordingly, as a promissory note paid a president's salary in the *Miller, Supra*, case, the

taxpayer's promissory note in the instant case paid its contribution to the employees' profit-sharing plan.

In deciding against the Petitioner, the court of appeals below chose not to follow the prior decisions of the Third, Ninth and Tenth Circuits[1] which held that the giving of a promissory note by an accrual basis taxpayer constituted "payment" under Section 404(a)(6) and its predecessor, Section 23(p)(1)(E). (Pet. for Cert., App. B p. 19a) The Third Circuit decisions were *Slaymaker Lock Co.* v. *Commissioner* and *Sachs* v. *Commissioner*, 208 F.2d 313 (C.A. 3, 1953), where the taxpayers transferred their own demand note to the trustee of the pension fund. Because of the similarities between Section 23(p)(1)(E), the forerunner of Section 404(a)(6), and Section 24(c)(1) of the Code, the *Sachs* court analyzed and correctly relied upon the *Miller* case. 208 F.2d at 315. Finding no compelling reason to construe the word "paid" differently as used in Section 23(p)(1)(E), the court held for the taxpayer and granted a deduction. In relying on *Miller, Supra*, the *Sachs* court was on solid ground. There is no rational reason, nor anything in the legislative history of Section 23(p) (now Section 404(a)) which justifies a different interpretation of the word "paid" as determined in *Miller*. (See Petitioner's Argument Infra)

Next, the Ninth Circuit in *Time Oil Co.* v. *Commissioner*, *Supra*, approved the Third Circuit's decision in *Sachs* and its reliance on the *Miller* case. In *Time Oil*, the taxpayer corporation delivered non-interest bearing demand notes to the trustee and later replaced the notes with stock. The

1 *Sachs* v. *Commissioner*, 208 F.2d 313 (C.A. 3, 1953); *Time Oil Co.* v. *Commissioner*, 258 F.2d 237 (C.A. 9, 1958); *Wasatch Chemical Co.* v. *Commissioner*, 313 F.2d 843 (C.A. 10, 1963).

court was asked to rule as to whether the delivery constituted payment. The court held that delivery of the notes constituted "payment" as of the delivery date and that the delivery date would determine the year of deductibility.

Then in *Wasatch Chemical Company* v. *Commissioner*, *Supra*, the Tenth Circuit held that the giving of a note constituted payment under Section 404(a)(6). By its holding, the Tenth Circuit adopted the rationale of both *Sachs* and *Time Oil* and their reliance on the *Miller* case. Additionally, the court in *Wasatch* relied on the Tax Court opinion in *Colorado National Bank of Denver* v. *Commissioner*, 30 T.C. 933 (1958) when it stated:

> Further as to whether cash is required the Tax Court in *Colorado National Bank of Denver* v. *Commissioner* . . . held that a contribution to a pension trust under Section 404 may be paid by a conveyance of real estate to the trustees. The Tax Court mentioned in the opinion:
>
> > "A payment need not be cash and even a debt can be paid in property if the debtor is willing to accept the property as payment. There is no reason why a contribution to a pension trust could not be made in property and still be deductible."
>
> The opinion, however, says the transfer there made did not resemble a promissory note and that it was a present transfer of an asset having a worth of a stated amount. The opinion certainly stands for the proposition that a transfer of something of value is recognized as payment.

Furthermore, a district court in the taxpayer's own circuit has held that the transfer of a note constitutes "payment" within the meaning of Section 404(a). *Advance Construction Co., Inc.* v. *United States of America*, 356 F. Supp. 1267 (N.D. Ill., 1973). In broad language the court said that the giving of a note was the precise point when an

intangible obligation to contribute to the plan was transformed into a tangible delivery of something of current cash value. 365 F. Supp. at 1272. The court as in *Wasatch*, *Supra*, indicated that the real issue was to ascertain the value of the note. 356 F. Supp. at 1274.

Until the opinion of the court of appeals below, the issue was well settled that accrual basis taxpayers' use of promissory notes constituted "payment" under Section 404 (a)(6). Although the Government and the Tax Court continued to disagree, whenever the issue was presented on appeal, their position was rejected. Thus, for more than twenty years highest precedent, upon which Petitioner and other taxpayers relied, approved the use of notes for accrual basis taxpayers under said Section 404(a)(6). (*See* Judge Quealy's dissenting opinion, Pet. for Cert., App. A p. 12a)

"Payment" by note under Section 404(a)(6) is now prohibited by the enactment of the Employees' Retirement Income Security Act of 1974 (hereinafter called "ERISA"). The Government so conceded in the court of appeals below. Thus, the precedent which the Government would have this Court overturn has no prospective meaning after the effective date of ERISA. Consequently, Petitioner respectfully submits that no reason exists why more than twenty years of precedent should now be overturned.

II.

FOR THE PURPOSES OF AN ACCRUAL BASIS TAXPAYER THE ISSUE IS WHETHER THE VALUE OF THE NOTE TRANSFERRED TO THE TRUSTEES EQUALED OR EXCEEDED THE AMOUNT OF THE CLAIMED DEDUCTION.

Section 404(a) provides for deductions "if contributions are paid". The word "contribution" has been defined to "at

least require some right to be relinquished or some obligation incurred by the contributor". *Norman Petty*, 40 T.C. 521, 523 (1963). Under Section 404(a)(6) a "payment" need not be in cash and can be paid in property if the creditor is willing to accept the property as payment. *Colorado National Bank of Denver* v. *Commissioner, Supra.* A contribution in kind is paid by the transferring of promissory notes of third parties owed to the taxpayer. Petitioner submits that the result should be the same when a taxpayer contributes its own promissory note. The important issue is whether something of value was transferred by the contributor.

Immediately after the transfer of the note the trustee of the profit-sharing plan could have negotiated the note to a third party and received cash or other property. A mere promise to pay a contribution to a profit-sharing fund at a future date creates no decrease in the company's assets, no increase in the funds' assets, and fails to provide the recipient with the physical evidence of current cash value. *Advance Construction Co.* v. *United States, Supra.* However, the tangibility and physical evidence of a promissory note constitutes the transfer of something of current cash value and represents payment under Section 404(a)(6). *Advance Construction Co.* v. *United States, Supra.* When a debtor gives a creditor a negotiable instrument for a debt, legal relations between the parties change. *Anthony P. Miller, Inc.* v. *Commissioner, Supra.* The obligations of the taxpayer under his promissory note and the rights of the payee or any subsequent holder of the promissory note are fixed.[2]

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[2] See Sections 3-301 *et seq.*, and Sections 3-401 *et seq.*, Commerercial Code, Smith-Hurd Ill. Annot. Stat., Ch. 26.

In addition, the promissory note represents a form of investment in the company, when the note is fully secured and bears interest as in this case. The taxpayer can avoid the circuitous route of giving cash and then having the funds lent back through the use of a note. *Advance Construction Co.* v. *United States, Supra.* Also, if the Court of Appeals' argument is followed to its logical conclusion, the taxpayer could satisfy the payment requirement by giving a check which is not cashed but instead returned in exchange for a promissory note. It would be unrealistic and pointless to require the writing of a check to the trust, the negotiation of that check back to the taxpayer and the simultaneous issuance of a note representing the loan. So long as the loaning of the funds by the trust is proper, which is undisputed in this instance. It is clear that the Government's attack only goes to the form of the transaction and not to its substance. This Court has recognized the principle that in matters of taxation, substance should prevail over form. *United States* v. *Phellis*, 257 U.S. 156, 168.

Thus, the real question to decide is not whether the taxpayer's note constitutes property but what is the value of the note. In this case the parties have stipulated that the notes equaled the amount of the claimed deduction. (Pet. App. ......) Petitioner submits that the giving of a promissory note and its comparable cash value as property constitutes payment within Section 404(a)(6) for an accrual basis taxpayer.

Taxpayers in similar circumstances to Petitioner could, as the Government would require, make a cash distribution to the plan and then have the cash returned to them by the trustees of the plan in exchange for a promissory note.

Such a circuitous transaction would not only incur additional administrative expenses, but also add to the complexity of operating a pension and profit-sharing plan, thereby discouraging more and more small employers from using such plans. In addition, the end result would be no different from the result reached in Petitioner's case and the cases it relies upon.

Also, the court of appeal's concern for evaluation problems (Pet. for Cert. App. B, 20a) is inconsistent in light of *Colorado National Bank of Denver* v. *Commissioner, Supra,* where a transfer of property was allowed. If the Commissioner is able to determine the value of property, he can surely do so for notes. Further, as ERISA makes this no longer a problem for the Commissioner, certainly whatever evaluation difficulties that may arise are minimal.

III.

THE COURT OF APPEALS ERRED IN TREATING CASH AND ACCRUAL BASIS TAXPAYERS ALIKE.

The court of appeals suggests that legislative history supports the conclusion that the "payment" requirement of Section 404(a) is not fulfilled by the Petitioner's delivery of a demand promissory note. (Pet. for Cert. App. B, P. 17a) Petitioner disagrees with that analysis.

Subparagraph (E) of Section 23(p)(1) of the Internal Revenue Code, predecessor of Section 404(a)(6), was added to H.R. 7378, 77th Congress, 2nd Session (1942 Act), by the Senate Finance Committee following hearings in which Mr. Richard D. Sturtevant, Assistant Secretary of Jewel Tea Co., pointed out that certain provisions in the House bill would destroy profit sharing plans of accrual basis

taxpayers like themselves. He testified before the Senate Finance Committee that the Jewel Tea Co. plan was a profit-sharing plan for employees whereby the company contributed a definite percentage of the profits each year over and above certain earnings on the common stock and that the company could not possibly determine until after the close of the year what would be the amount of the contribution. (See Hearings on H.R. 7378, 77th Cong. 2d Sess., Senate Finance Committee, pp. 461, 462, 465).

Thus, Petitioner contends that subparagraph 23(p)(1)(E) (the forerunner of Section 404(a)(6)) was adopted by Congress primarily to afford profit-sharing trusts 60 days after the close of the year to compute and make payment of an accrued liability for a contribution to any such trust because of the difficulty in determining the amount before the close of the year. There is nothing in the legislative history to indicate how payment should be made or that payment for an accrual basis taxpayer is the same as a cash basis taxpayer.

The court of appeals' opinion rests on the proposition that for the purposes of Section 404(a)(6) accrual and cash basis taxpayers are on an equal footing with respect to contributions to employees' trusts. (Pet. for Cert. App. B, p. 15a) Such a conclusion is unsupported. The Government's case should fall unless it demonstrates that the purpose of Section 404(a)(6) was to convert an accrual basis taxpayer's method of accounting to cash basis for the purpose of contribution to an employer's profit-sharing plan.

Section 404(a)(6) allows the taxpayers on the accrual basis an additional period of 75 days beyond the close of the taxable year within which payments to employees' trusts

may be made and deduction taken as though the payment had actually been made within the taxable year. But this additional grace period was not given to those on the accrual basis only. Thus, in spite of the provisions of Section 404 (a)(6), a cash basis taxpayer still had to make his type of payment within the taxable year, while another taxpayer, with perhaps an identical employee trust, had an additional 75 days to make his payment because such taxpayer happened to be on the accrual basis. Accordingly, what constitutes payment for an accrual basis taxpayer under Section 404(a)(6) should not be influenced by the requirements of a cash basis taxpayer.

This argument is supported by the Employees' Retirement Income Security Act of 1974 (ERISA). Under ERISA, tax deductible contributions to all qualified plans may be made at any time up to the filing date for Federal income tax returns, corporate, partnership or individual as the case might be, including any extension, Section 1013(c)(2); Section 404(a)(6) as amended, Int. Rev. Code of 1954. Now cash basis taxpayers are given the same advantages of the extension of time to make payments as an accrual basis taxpayer. Thus, Section 404(a)(6) does not convert accrual basis taxpayers to a cash method of accounting with respect to contributions to profit-sharing plans. Cf. *Musselman Hub-Brake Co.* v. *United States, Supra*, where the same argument was advanced by the Government and rejected by the court.

The court of appeals below felt that the term "actually paid", as used by the Ways and Means Committee Report on the Revenue Revision Act of 1948, prevents a promissory note from constituting "payment". (Pet. for Cert. App. B, p. 17a) It is unclear how the word "actually" clarifies the

matter as the Government contends. If a promissory note constitutes "payment" within the meaning of Section 404 (a)(6), then it surely constitutes "actual payment"[3] and thus, the contribution is "actually paid". If Congress intended "a liquid form of payment", then it would have used the term "paid in money" as it did in Section 1385(a) (1) & (2).[4] Further it should be noted that Congress failed to use the term "actually paid" when Section 404 was enacted.

The court of appeals attempts to justify its decision in a two-step process. First, it states that for the purposes of Section 404(a) accrual basis and cash basis taxpayers are in the same position. Second, proceeding from this incorrect premise the court draws on the cases of *Eckert* v. *Burnet*, 283 U.S. 140 and *Helvering* v. *Price*, 309 U.S. 409, which deal with deductions concerning cash basis taxpayers. Petitioner submits that the court's reliance on those cases is unwarranted because the sections of the Code construed

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[3] Petitioner submits the same argument applies to the court's reliance on the Treasury Regulations (Pet. for Cert., App. B, p. 15a).

[4] Internal Revenue Code of 1954 (26 U.S.C.): Section 1385. Amounts includible in patron's gross income.
(a) General rule.
Except as otherwise provided in subsection (b), each person shall include in gross income—
(1) the amount of any patronage dividend which is paid in money . . .,
(2) any amount, described in Section 1382(c) (2)(A) (relating to certain nonpatronage distributions by tax-exempt farmers' cooperatives), which is paid in money. . . .

and the issues involved in those cases were entirely different from those involved here. The statutory provisions considered in those two cases never use the word "paid" or "payment". The meaning of the words "charged off" and "sustained" in the statutory provisions interpreted in *Eckert* and *Price* cannot be controlling in the case at hand. It is true that the words "paid" and "payment" are found in these opinions, but Petitioner submits that they are only mentioned for the purpose of cash basis taxpayers. *Eckert* and *Price* cannot be said to stand for broad principles of Federal income tax law which would apply to accrual basis taxpayers. Cf. *Musselman Hub-Brake Co.* v. *United States, Supra,* 139 F.2d at 69.

Relying on prior judicial interpretations that it was not violating legislative policy, the Petitioner in this case acted in good faith to create an asset for the trust in each of the years to which this appeal relates. There was a change in positions since the trust assets increased and the Petitioner's net worth decreased. Petitioner has met the requirements of the congressional policy and is entitled to the deduction in furtherance of that policy.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals below should be reversed and an order entered allowing the deductions for contributions to the Profit Sharing Plan and disallowing any assessment of deficiencies for the taxable years ended April 30, 1967, April 30, 1968 and April 30, 1969.

Respectfully submitted,

MARVIN L. SCHRAGER
DURWARD J. LONG, SR.
912 - 16th Avenue
East Moline, Illinois 61244
Attorneys for Appellant